LESCO DEVELOPMENT CORP. SDN. BHD.

v.

MALAYSIA BUILDING SOCIETY BHD.

SUPREME COURT, KUALA LUMPUR
WAN SULEIMAN SCJ
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 417 OF 1986]
9 SEPTEMBER 1987

CIVIL PROCEDURE: *Claim on loan filed in Commercial Division - Charge executed as security for loan - Foreclosure proceedings on charge filed in the Family and Property Division - Judgment in default of appearance - Application to set aside default judgment pending in Commercial Division - Order of sale given in foreclosure proceedings by Family and Property Division - Whether order or sale is premature.*

On 13 December 1985 the respondent filed a suit against the appellant and five guarantors in the commercial division of the High Court, Kuala Lumpur, for the sum of RM4,688,863.70 owing as at 31 October 1985 in respect of loan of RM5,000,000 which was secured by a charge.

On 17 December 1985 the respondent filed in the family and property division of the High Court, Kuala Lumpur, an originating summons to initiate foreclosure proceedings against the appellant on the charge.

On 31 January 1986 the respondent obtained judgment in default of appearance against the appellant in the commercial division. On 15 April 86 the appellant filed summons-in-chambers applying to set aside the default judgement and took steps to show that it has a good defence. While the application to set aside the default judgement was still pending in the commercial division, the originating summons on foreclosure proceedings came up for hearing on 19 May 1986. The appellant in opposing the application for foreclosure disclosed in their affidavit the notice of default in form 16D issued by the respondent was defective and invalid and also of the default judgment obtained by the respondent. The learned Judge granted the order of sale. The appellant appealed against this order.

Held:

[1] It is undesirable to allow a situation where two different Courts would try and determine the same issues arising between the same parties relating to the same subject matter.

[2] As there was already default judgment in the suit filed in the commercial division and the application to set aside the default judgment was still pending, the Supreme Court was of the opinion that the hearing of the originating summons (foreclosure proceedings) should have been postponed until final disposal of the suit.

[3] The order of sale was set aside. The Supreme Court ordered that the originating summons be dealt with after the final disposal of the suit.

[Appeal allowed with costs. Deposit refunded to appellant.]

Legislation referred to:
Civil Law Act 1956, s. 11

For the appellant - G. Krishnan; M/s. Krishnan & Co.
For the respondent - Grace Lim; M/s Rashid & Lee

JUDGMENT

Wan Hamzah SCJ:

In December 1981 the appellant, Lesco Development Corporation Sdn. Bhd. (hereinafter referred to as Lesco) charged its land to the respondent, Malaysia Building Society Bhd. (hereinafter referred to as MBS) on the terms and conditions contained in an agreement attached to the document of charge as an annexure, to secure a loan of RM5,000,000 which MBS had agreed to grant to Lesco. A document dated 30 November 1981 which was purported to be a document of guarantee in respect of tzhe loan was signed by five person (hereinafter referred to as the guarantors).

On 13 December 1985 MBS filed a suit in the commercial division of the High Court at Kuala Lumpur (Civil Suit C 8369/1985) against Lesco and the five guarantors, in which it is alleged that Lesco owed MBS a sum of RM4,688,863.70 as at 31 October 1985 in breach of the terms and conditions of the charge. MBS claims that sum from Lesco and the guarantors. A few days later, i.e., on 17 December 1985, MBS filed in the family and property division of the High Court at Kuala Lumpur an originating summons (Originating Summons F 2652/1985) to initiate foreclosure proceedings against Lesco in respect of the same charge.

On 31 January 1986 MBS obtained judgment in default of appearance against Lesco in Civil Suit C 8369/1985. On 15 April 1986 Lesco filed summons-in-chambers asking for an order to set aside the default judgment and took steps to show that it has a good defence. In this regard it is alleged by Lesco *inter alia* as follows:

(a) MBS had breached the agreement (particulars of the breach are stated).

(b) By letter dated 13 July 1985 MBS had terminated the agreement.

(c) MBS had not released the loan of RM5,000,000 in full, and under the terms of the agreement MBS can recover the loan only after it has released the loan in full.

(d) MBS's claim for compound interest is in contravention of s. 11 of the Civil Law Act.

The application to set aside the default judgment is still pending in the commercial division. In opposing the foreclosure proceedings Lesco raised the same issues as stated in (a) to (d) above. Lesco also contended that the notice of default in form 16D issued by MBS was defective and invalid for the reasons stated in the affidavit in opposition. The fact that MBS had obtained the default judgment was disclosed by Lesco in its affidavit. On 19 September 1986 the originating summons came up for hearing before Siti Norma J and after hearing submissions of Counsel for the respective parties she decided on all the issues and granted order of sale. The present appeal before the Supreme Court is brought against that order.

It is undesirable to allow a situation where two different Courts would try and determine the same issues arising between the same parties relating to the same subject matter. As MBS had chosen to sue Lesco in the commercial division before filing the originating summons and there was already default judgment in the suit and the application to set

aside the default judgment is still pending, in our opinion the hearing of the originating summons should have been postponed until final disposal of the suit in the commercial division. Therefore we order that the order of sale be set aside. We further order that the originating summons be dealt with after the final disposal of the suit, and that appropriate orders should be made on the originating summons taking into consideration the result of the suit.

The appeal is allowed with costs here and in the Court below. The deposit should be refunded to Lesco (appellant).

Also found at [1987] 2 CLJ 290